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26 **UNITED STATES DISTRICT COURT**
27 **NORTHERN DISTRICT OF CALIFORNIA**

28 JEFFREY SIMON

Plaintiff,

vs.

UNUM LIFE INSURANCE
COMPANY OF AMERICA and THE
LIPMAN COMPANY, INC. LONG
TERM DISABILITY PLAN

Defendants

Case No.: C07-2213 WDB

**JOINT INITIAL CASE
MANAGEMENT CONFERENCE
STATEMENT**

Date: July 30, 2007
Crt: 4 (Oakland)
Time: 4:00 p.m.

1 Comes now Defendant Unum Life Insurance Company of America ("Unum") and
2 Plaintiff Jeffrey Simon ("Simon") and jointly submit this initial case management conference
3 statement pursuant to Local Rule 16-9.

4 **1. JURISDICTION AND SERVICE**

5 This Court has subject matter jurisdiction over this action pursuant to 29 U.S.C. §§
6 1132(a), (e), (f) and (g) of ERISA.

7 Defendant Unum has been served and has appeared.

8 Defendant The Lipman Company, Inc. Long Term Disability Plan has not been served.
9 Plaintiff is in the process of amending the Complaint to name the correct Plan entity and
10 ascertaining the entity responsible for accepting service upon the Plan. Plaintiff is informed and
11 believes that plaintiff's former employer, the Lipman Company/Simpata, Inc. is now defunct.

12 **2. FACTS**

13 Plaintiff was insured under a disability policy issued by Unum to the Lipman Company
14 dba Opti-Source. Plaintiff made a claim for benefits under the Plan claiming that he was
15 disabled because of dermatomyositis. Plaintiff's claim was denied on November 6, 2001 and no
16 appeal was made of the claim denial. At some point thereafter, Unum entered into the
17 Regulatory Settlement Agreement and California Settlement Agreement and Plaintiff elected to
18 participate in the Reassessment Program. On January 31, 2007, Unum accepted Plaintiff's claim
19 for the period February 3, 2001 through June 30, 2002, but denied that Plaintiff was entitled to
20 any additional benefits. Through the California Settlement Agreement's Independent Review
21 Process, on February 6, 2007, Plaintiff voluntarily appealed Unum's determination that he was
22 only entitled to benefits through June 2002. On April 11, 2007, upon appeal, Unum upheld the
23 January 31, 2007 determination that Plaintiff was entitled to benefits under the policy for a
24 closed period of time. Plaintiff then commenced this lawsuit.

25 **3. LEGAL ISSUES**

- 26 a) Has Plaintiff exhausted his administrative remedies.
27 b) Has the statute of limitations run on Plaintiff's claim.
28

1 c) If the statute of limitations has run on the original claim decision does Unum's
2 payment of benefits in 2007 establish a new cause of action.

3 d) If the statute of limitations has run on the original claim decision does the California
4 Settlement Agreement revive the claim.

5 e) Does the payment of benefits in 2007 mandate that the statute of limitations did not
6 begin to accrue until the payment of benefits and the subsequent termination.

7 f) Should the Court employ the *de novo* standard of review or the abuse of discretion
8 standard of review.

9 g) Dependent upon the standard of review, what degree of deference should the Court
10 give to the claims decision.

11 h) Is the Plaintiff disabled within the meaning of the plan documents and the policy.

12 i) What is the amount of benefits to which Plaintiff is entitled pursuant to the terms and
13 conditions of the policy at issue in this action.

14 j) Was the Independent Review Process in compliance with the California Settlement
15 Agreement.

16 k) Does the Court have jurisdiction to make any determination regarding the Independent
17 Review Process and the California Settlement Agreement.

18 **4. MOTIONS**

19 Plaintiff anticipates making a motion as to the sufficiency of the Independent Review
20 Process under the California Settlement Agreement. Plaintiff may also make a motion to
21 determine the scope of the Record and/or augment the Record. Plaintiff would object to a
22 motion for summary judgment regarding the overall propriety of Defendant's denial-of-benefits
23 as such decision is properly adjudicated at trial.

24 Unum will move for summary judgment on the statute of limitations and exhaustion of
25 remedies issues. Unum may make a motion for summary judgment on the merits. Unum does
26 not agree that this Court has jurisdiction to rule on the sufficiency of the Independent Review
27 Process and/or enforcement of the California Settlement Agreement. Unum will make the
28 appropriate motion if Plaintiff pursues this claim. Unum does not agree that the Administrative

1 Record may be augmented and if Plaintiff pursues discovery as set forth below, Unum will make
2 the appropriate motions.

3 **5. AMENDMENT OF PLEADINGS**

4 Plaintiff will amend the complaint once the identity of the correct Plan entity is
5 ascertained.

6 **6. EVIDENCE PRESERVATION**

7 None.

8 **7. DISCLOSURES**

9 FRCP 26(f)(1): The parties have agreed to produce their respective initial disclosures by
10 July 30, 2007.

11 **8. DISCOVERY**

12 Plaintiff intends to serve written discovery to ascertain whether there was any proper
13 grant of discretionary power, and if properly granted, if discretionary power remained valid.
14 Plaintiff intends to serve written discovery on the nature, extent and effect of any conflict of
15 interest on the claims decision. Plaintiff may also conduct limited deposition discovery of the
16 reviewing physicians, and those individuals who determined Plaintiff's eligibility for benefits
17 under the Plan. Plaintiff anticipates deposition discovery will be minimal. Dependent upon the
18 contents of Defendant's initial disclosures, Plaintiff reserves the right to conduct discovery
19 regarding the proper contents of the claim file produced by Defendant. Plaintiff intends to
20 conduct discovery on the legal effect Unum's claim decisions pursuant to the California
21 Settlement Agreement have on reassessment participants. Plaintiff may also conduct discovery
22 on the manner in which the Independent Review Process, as implemented, contradicted the terms
23 of the Independent Review Process as entered into by the California Department of Insurance on
24 behalf of California Consumers.

25 Defendant contends that as this is an ERISA case, no evidence outside the Administrative
26 Record is admissible; there is no need for discovery; depositions of physicians are improper and
27 there is no basis for discovery related to the California Settlement Agreement and the
28 Independent Review Process.

1 **9. CLASS ACTIONS**

2 This is not a class action.

3 **10. RELATED CASES**

4 There are no related cases.

5 **11. RELIEF**

6 The parties agree that if liability is established, Plaintiff would only be entitled to the
7 specific damage amount under the policy from the termination of benefits to the date of the entry
8 of judgment, less any applicable offsets. Plaintiff contends that he is also entitled to
9 prejudgment and postjudgment interest, costs and his attorneys' fees. Plaintiff further prays for
10 injunctive relief requiring payment of all disability benefits and any other employee benefits
11 owed under the LTD Plan.

12 Plaintiff may also seek declaratory and/or injunctive relief regarding the sufficiency of
13 the Independent Review Process.

14 **12. SETTLEMENT AND ADR**

15 The only impediment to early ADR is the need to determine whether Unum's statute of
16 limitations defense has merit.

17 Plaintiff prefers that the matter be referred to a Magistrate Judge. Unum believes that this
18 matter is more appropriately assigned to the Early Neutral Evaluation Program.

19 The parties have requested an ADR teleconference which is scheduled for July 26, 2007
20 at 10:30 a.m.

21 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

22 All parties consent to the assignment of this matter to a Magistrate Judge for all purposes.

23 **14. OTHER REFERENCES**

24 No other references are appropriate or needed.

25 **15. NARROWING OF ISSUES**

26 The referenced summary motions will narrow the issues for trial.

27 **16. EXPEDITED SCHEDULE**

1 An expedited schedule could be appropriate, provided sufficient time is allowed for the
2 anticipated summary judgment motions.

3 **17. SCHEDULING**

4 **Discovery cutoff:** **January 14, 2008**

5 **Last day to Hear Dispositive Motions:** **January 28, 2008**

6 **Opening Trial Briefs:** **February 27, 2008**

7 **Responsive Trial Briefs:** **March 12, 2008**

8 **Trial:** **March 26, 2008**

9 **18. TRIAL**

10 This will be a court trial. No testimony will be given so the time allotted would be same
11 as for an extended summary judgment hearing.

12 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

13 Unum and Plaintiff have filed their respective Certificates of Interested Entities or
14 Persons.

15 Plaintiff's Disclosure:

16 The undersigned, counsel of record for Plaintiff Jeffrey Simon certifies that the following
17 listed parties have a direct, pecuniary interest in the outcome of this case. The following is a list
18 of the names of all such parties with their connection and interest herein: (1) Jeffrey Simon; (2)
19 Unum Life Insurance Company of America; and (3) The Lipman Company dba Opti Source.

20 Unum's Disclosure:

21 Pursuant to Civil L.R. 3-16, the undersigned, counsel of record for defendant Unum Life
22 Insurance Company of America, certifies that there are no other interested entities or persons
23 other than defendant Unum Life Insurance Company of America and its parent corporation,
24 Unum Group, formerly known as UnumProvident Corporation, who have a direct, pecuniary
25 interest in the outcome of this case. These representations are made to enable the Court to
26 evaluate possible disqualification or recusal.

By /s/
Corinne Chandler
Attorneys for Plaintiff
Jeffrey Simon

